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Civil Procedure

Martha M. Jenkins

CIVIL PROCEDURE

MARTHA M. JENKINS*

This article reviews cases decided by the Court of Appeals for the Seventh Circuit in its 1976-1977 term.[1] The decisions range from those having some legal significance, to those which ought merely to serve as reminders to attorneys, parties and courts of the nature and scope of their powers and responsibilities, and of the need to be careful and diligent. The decisions are segregated into topical civil procedure categories.

JURISDICTION

Long Arm Jurisdiction

McBreen v. Beech Aircraft Corporation[2] raised the question of minimal due process under the tortious act portion of the Illinois Long Arm Statute[3] in a defamation action in the Illinois district court. It was clear that if a tort was committed, it was committed in Illinois. The only question was whether subjecting the defendant to the *in personam* jurisdiction of the Illinois district court comported with the due process clause of the fourteenth amendment.

The facts were that Beech, by its attorneys in Kansas, had brought an antitrust suit, naming, among others, McBreen, the plaintiff in the Illinois proceeding. Beech's Kansas counsel received a telephone call, in Kansas, from a publication called *Business Insurance*. The lawyer did not know where the call originated, but thought it had come from Masachusetts.[4] In fact the call was placed from Chicago, which was *Business Insurance's* place of publication and one of its areas of distribution. Shortly after the telephone conversation, an article appeared in *Business Insurance*.[5] McBreen considered the article libelous and sued Beech and its Kansas counsel in the Illinois federal district court.

The district court applied a rule of foreseeability, and held that regardless of where the Kansas attorney had believed the call originated from, he

* J.D., University of Minnesota, sole practioner in the antitrust, securities, and business area.

1. The article covers cases decided by the Seventh Circuit between the Summer of 1976 and the Fall of 1977.

2. 543 F.2d 26 (7th Cir. 1976).

3. Ill. Civ. Prac. Act § 17, ILL. REV. STAT. ch. 110, § 17 as applied through FED. R. CIV. P. 4(e).

4. 543 F.2d at 28.

5. *Id.*

should have been aware of the "nature and scope of distribution of *Business Insurance*", and thus the possible effect of his remarks in Illinois.[6] The Seventh Circuit rejected such a rigid formula.[7] Instead, it looked to the "quality and nature of a defendant's activity" and whether that defendant "can be said to have invoked, by act or conduct, the benefits and protection of the laws of the forum."[8] The court found that Beech's Kansas counsel did not have sufficient contacts with Illinois to justify subjecting him to the jurisdiction of the district court.[9]

The court distinguished *Gray v. American Radiator & Standard Sanitary Corp.*[10] and *Honeywell, Inc. v. Metz Apparatewerke*,[11] on the ground that while those cases involved single tortious acts, the defendants there had placed their products into the ordinary course of commerce where the product could be expected to come to Illinois.[12] The court similarly distinguished the defamation cases against publishers who had placed their publications into the stream of commerce.[13] In *McBreen*, the Kansas lawyer merely responded to a telephone call initiated by a reporter. He did not place his statements into the "stream of commerce".[14] The Illinois single telephone call cases were also distinguished on the ground that the telephone calls in those cases were initiated by the nonresident defendant.[15]

Standing

The court dealt in two cases with the jurisdictional question of standing. In the first, *City of Milwaukee v. Saxbe*,[16] Milwaukee sought declaratory and mandamus relief against the United States Attorney General to prevent the Attorney General's continuing investigation of allegedly discriminatory hiring practices by the city's police and fire departments. The complaint basically alleged discriminatory enforcement, in that the Attorney

6. *Id.* at 29.
7. *Id.*
8. *Id.*
9. *Id.* at 32.
10. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
11. 509 F.2d 1137 (7th Cir. 1975).
12. 543 F.2d at 29-30.
13. *See* Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967); Process Church of Final Judgment v. Sanders, 338 F. Supp. 1396 (N.D. Ill. 1972). The court noted contrary authority but did not decide whether there is a different minimum contact standard for defamation cases potentially involving First Amendment considerations, *i.e.* that greater minimum contacts should be required. *See* New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966).
14. The result would be different if the non-resident defendant's participation in the preparation of a publication were more extensive. Novel v. Garrison, 294 F. Supp. 825 (N.D. Ill. 1969).
15. Colony Press, Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1974); Cook Assocs., Inc. v. Colonial Broach & Mach. Co., 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973).
16. 546 F.2d 693 (7th Cir. 1976).

General was investigating the City of Milwaukee but not surrounding communities, thus harming minority residents of the City of Milwaukee who might be denied jobs in the police and fire departments of the surrounding municipalities.[17] The Seventh Circuit found that Milwaukee had no standing to bring such a complaint.[18] There was no injury to its citizens which it could claim in a representative capacity in that there was no allegation that any surrounding municipality did in fact discriminate against black, Spanish speaking or female citizens of the City of Milwaukee.[19] Moreover, there was no injury to the city itself. Even if discriminatory enforcement were assumed, the fact that Milwaukee voluntarily spent money in connection with the Attorney General's investigation designed to achieve compliance with the Law of the Land is not a legal wrong or injury likely to be redressed by a favorable decision in the suit brought by the city. The court did not remand with leave for the city to amend, as it found that the district court lacked jurisdiction on other grounds.[20]

The Seventh Circuit rejected the argument in *Saxbe* that the district court had jurisdiction pursuant to section 1361,[21] which provides for mandamus to compel officers or agents of the United States to perform a duty owed the plaintiff. Mandamus is not available unless there is a clear right to the relief sought, a clear duty on the part of the defendant to do the act in question, and no other adequate remedy is available.[22] The court found no clear peremptory duty requiring the Attorney General to investigate discriminatory practices in any particular manner or order.[23]

The Seventh Circuit similarly rejected jurisdiction in *Saxbe* under section 1331,[24] on the ground that the amount in controversy did not exceed $10,000. The court compared the two rules concerning the determination of the amount in controversy[25] (the value to the plaintiff of the right sought to be protected or the pecuniary result for either party) and adopted the approach which measures the amount in controversy by the value of the right to be protected.[26] In this case, it did not feel that the right of the City of Milwaukee to be free from selective and discriminatory prosecution was satisfactorily shown to exceed $10,000. The court again did not remand for

17. *Id.* at 696-97.
18. *Id.* at 698.
19. *Id.*
20. *Id.* at 699-703. *See* text accompanying notes 21-27 *infra*.
21. 28 U.S.C. § 1361 (1970).
22. State Dept. of Public Welfare of Texas v. Weinberger, 388 F. Supp. 1304 (D.C. Tex. 1975); *accord* City of Highland Park v. Train, 519 F.2d 681, 691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).
23. 546 F.2d at 701.
24. 28 U.S.C. § 1331 (1970).
25. 546 F.2d at 701-02.
26. *Id.* at 702.

further consideration as it found that the city was not entitled to relief on substantive grounds. It had not alleged intentional, purposeful discrimination, as opposed to selective enforcement having the effect of perpetuating racial discrimination.[27] In addition, the Attorney General is not required to act simultaneously with respect to all violators of the law, nor does he forfeit the right to bring any action against any violators by failing to so act.

In *Mulqueeny v. National Commission on the Observance of International Women's Year, 1975*[28] the Seventh Circuit dealt with standing in a way that probably pleased the feminists of the Bar. Plaintiffs were chairpersons of an organization called "Stop ERA". This group was opposed to the ratification of the proposed Equal Rights Amendment and, apparently, was also involved in anti-abortion activities. Plaintiffs sued seeking judicial termination of the Commission and an order requiring the Commission to return to the United States Treasury all monies which had been spent by the Commission for the ratification of the proposed Equal Rights Amendment and any other lobbying activities.[29] Alternatively, plaintiffs sought an injunction against the Commission to stop any activities designed to promote ERA or pro-abortion positions, or to compel the appointment of persons to the Commission who would balance its stances on the ERA and abortion.[30]

Plaintiffs alleged they had standing because for several years they had spent time, effort and personal funds carrying out educational programs showing the harmful effect which would result from the ratification of the proposed amendment. Plaintiffs alleged that all of this was in danger of being destroyed by the Commission's illegal actions.[31] While eschewing generalizations about standing, the court found that plaintiffs had suffered no injury in fact: " '[M]ere interest' in the resolution of an issue, no matter how compelling, no matter how vigorously and vocally expressed, is of itself inadequate as a substitute for the Article III requirement that a litigant demonstrate personal, concrete injury."[32] Even assuming injury in fact:

> [P]laintiffs lack standing to invoke the jurisdiction of the federal court in that only through reliance upon the most speculative inferences is a relationship between defendant's conduct and plaintiffs' claimed harm apparent. It is wholly conjectural whether the exercise of remedial powers possessed by the federal court, as desired by plaintiffs, would result in the maintenance of the status quo in the Illinois legislature's posture on the issue of ratifying the Equal Rights Amendment.[33]

27. *Id.* at 703; *see* Washington v. Davis, 426 U.S. 229 (1976).
28. 549 F.2d 1115 (7th Cir. 1977).
29. *Id.* at 1119.
30. *Id.*
31. *Id.*
32. *Id.* at 1121.
33. *Id.*

The "new" federalism asserts itself here. The courts may not be available just because the other branches of government work slowly and may be unresponsive. Standing does not come into being "merely because no other individual is willing or able to vindicate a claim."[34]

Miscellaneous Jurisdictional Cases

In *Ktsanes v. Underwood*[35] an applicant for admittance to the Illinois Bar clearly did not fit within the rules for admission and applied for an exemption.[36] The Illinois Supreme Court denied the exemption. The applicant then filed a section 1983[37] civil rights action in the federal district court attacking the constitutionality of the rule under which he had been excluded. This question was not raised by the petition for exemption. The district court dismissed.[38] The Seventh Circuit reversed, holding that the court had jurisdiction to review the legislative standards for admission to the bar. The court did not consider this collateral review of a state court action because the state court made an administrative rather than a judicial decision.[39] The constitutional questions were first asserted in the district court and deserved determination.

Plaintiff in *28 East Jackson Enterprises, Inc. v. Cullerton*[40] alleged that he had no "plain, speedy and efficient remedy" in the Illinois courts for a wrongful tax assessment.[41] There was a pending state case in which the same claims raised in the federal case could have been resolved.[42] Plaintiff deliberately failed to raise the federal issues there. The Seventh Circuit dismissed the case for lack of jurisdiction, holding that where a federal suit is based on the absence of an adequate state remedy for a federal claim, and the claimant purposely does not raise the issue in state courts, the federal court has no jurisdiction to hear the case.[43]

ABSTENTION, STAY, DISMISSAL, ABATEMENT, FEDERALISM

Any attempt to understand *Younger v. Harris*,[44] its companion cases[45]

34. *Id.* at 1122.
35. 552 F.2d 740 (7th Cir. 1977).
36. The applicant applied for admission on foreign license, but was denied admission because he had once taken and failed to pass the Illinois bar exam.
37. 42 U.S.C. § 1983 (1970).
38. 552 F.2d at 741.
39. *Id.* at 743.
40. 551 F.2d 1093 (7th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3216 (U.S. Oct. 4, 1977) (No. 76-1823).
41. *Id.* at 1094.
42. 28 East Jackson Enters. v. Rosewell, 65 Ill. 2d 420, 358 N.E.2d 1139 (1976).
43. 551 F.2d at 1095-96.
44. 401 U.S. 37 (1971).
45. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

and progeny,[46] is not likely to leave even the most assiduous scholar with a clear and lucid definition of when one asks for or receives a stay, abates an action, obtains a dismissal, asks for abstention, or what the result of any of these orders will be in terms of further proceedings such as an appeal.

At least one decision of the Seventh Circuit affirmatively adds to this general lack of lucidity. In *Calvert Fire Insurance Co. v. Will*,[47] there were identical state and federal actions pending. The only difference between the two was that one claim based on rule 10b-5 of the Securities Exchange Act of 1934[48] was exclusively in the federal court. The plaintiff in the state court proceeding (defendant in the federal proceeding) moved to "abate" the federal action on the ground that its state action had been initiated first.[49] The district court entered an order "staying" all claims in the federal suit except the 10b-5 claim.[50] At the same time the district court entered its stay order, it heard an argument concerning whether a certain interest constituted a security. This was the primary issue underlying the 10b-5 claim. The district court failed to rule on that question and declined to permit interlocutory review of its stay order.[51] The federal plaintiff filed a petition for a writ of mandamus asking the Seventh Circuit to require the district court to adjudicate its entire claim, *i.e.* to reverse its stay order and to rule on the pending securities question.

The Seventh Circuit, relying on *Aetna State Bank v. Altheimer*,[52] ruled that the district court's stay order was proper at the time it was granted.[53] *Aetna* involved an identical situation where a district court stayed an action brought under rule 10b-5 in deference to state proceedings involving the same transaction where the 10b-5 claim was made an affirmative defense. However, the Seventh Circuit in *Calvert* found that the subsequent Supreme Court decision, *Colorado River Water Conservation District v. United States*,[54] made the district court's order improper. The *Colorado River* case defined situations in which abstention is proper, a doctrine not applicable in *Calvert*, and situations in which dismissal is proper where concurrent jurisdiction exists between federal courts or state and federal

46. *E.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); Mitchum v. Foster, 407 U.S. 225 (1972).

47. 560 F.2d 792 (7th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3426 (U.S. Jan. 10, 1978) (No. 77-693).

48. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*lll* (1970).

49. 560 F.2d 794.

50. *Id.*

51. *Id.*

52. 430 F.2d 750 (7th Cir. 1970).

53. 560 F.2d at 795.

54. 424 U.S. 800 (1976).

courts. Generally, the position of the *Colorado River* case is that a federal court has an obligation to exercise its jurisdiction absent exceptional circumstances.[55] Exceptional circumstances might include: (1) the assumption of jurisdiction over a *res* by the state court; (2) avoidance of piecemeal litigation; (3) inconvenience of the federal forum; and (4) the time sequence in which jurisdiction was obtained by the two forums.[56] The Seventh Circuit noted that *Calvert* differed from *Colorado River* in that the district court did not dismiss, but had stayed all but the 10b-5 claim, which it retained but refused to decide.[57] The Seventh Circuit dismissed this distinction, finding that the effect of the district court's order was to preclude federal resolution of the federal claims, making the order equivalent to a dismissal.[58] The Seventh Circuit found no exceptional circumstances under the reasoning of *Colorado River* and held that the rationale developed in *Aetna* could no longer stand and *Aetna* should be overruled as a matter of law.[59] The writ of mandamus was granted, and the district court was ordered immediately to proceed to determine the claims under the Securities Exchange Act of 1934.[60]

There are several points of confusion which arise from *Calvert*. The court, in a footnote, stated: "In *Aetna*, we defined abatement 'as being the overthrow of an action which defeats the action for the present but does not debar the plaintiff from commencing it in a better way.' We assume that [the judge] meant to use 'stay' as a synonym for 'abate.' "[61] It is not clear how abatement can be the same thing as stay. The court retains jurisdiction over actions which are stayed. An abatement results in a dismissal. Different consequences follow.

A more serious problem was raised in connection with the request for a rehearing en banc on the question of overruling the *Aetna* case. Rehearing was not granted, but four judges filed a statement which was appended as a footnote to the opinion.[62] That statement noted that in overruling *Aetna*, the Seventh Circuit apparently took from the district court the *power* to stay proceedings, rather than merely finding that the district court abused its

55. *Id.* at 817.
56. *Id.* at 818.
57. 560 F.2d at 795-96.
58. *Id.*
59. *Id.* at 796.
60. *Id.* at 797. The court apparently did not know whether the state proceedings had been concluded. It specifically stated that it did not decide whether the state proceedings, if they were concluded, would be res judicata as to those portions of the federal complaint which the district court had stayed. Nor did the court reach the "difficult issue" of whether the conclusion of the state proceedings would have a collateral estoppel effect on the 10b-5 claim for damages over which the court retained jurisdiction, but declined to resolve. *Id.*
61. *Id.* at 796-97 n.4.
62. *Id.* at 797 n.5.

discretion in staying the particular proceedings involved in *Calvert*. The statement rued the demise of *Aetna* in that its continued viability would at most result in discretionary stays, not dismissals, as in the *Colorado River* case.[63] The judges filing the statement attributed the result reached by the panel to the fact that the case was there on mandamus, rather than appeal.[64] Mandamus would have precluded review of a discretionary stay. They thought the panel erred in that the stay order might have been appealable in this circuit, citing *Drexler v. Southeast Dubois School Corp.*,[65] and *Vickers v. Trainor*.[66] In neither of those cases, however, did the court directly consider the question of appeal. The panel cited the Third Circuit case of *Cotler v. Inter-County Orthopaedic Association, P.A.*,[67] for the unappealability of the order. *Cotler* did consider the issue, and it is true as a majority rule that stay orders are not appealable except in certain exceptional circumstances.[68]

The result of the *Calvert Fire* decision, however difficult to fully understand, may be favorable to those who advocate the exercise of federal jurisdiction. It appears clear that in this circuit, when a case is properly before the federal court, the first choice is that the federal court must exercise its jurisdiction. When there are considerations of constitutional adjudication and federal-state relations, the abstention doctrine may be invoked only as "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."[69] If the court retains jurisdiction,[70] the order will normally not be appealable, unless somehow it falls within the scope of section 1292(b),[71] mandamus, or perhaps, in a rare case, a doctrine like the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*[72] In many cases, however, abstention will result in dismissal.[73] Indeed, dismissal will be the more usual result and will give an automatic right of appeal.[74]

Under circumstances "considerably more limited than the circum-

63. *Id.*
64. *Id.*
65. 504 F.2d 836 (7th Cir. 1974).
66. 546 F.2d 739 (7th Cir. 1976).
67. 526 F.2d 537 (3d Cir. 1975).
68. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955). *See also* Jackson Brewing Co. v. Clarke, 303 F.2d 844 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962).
69. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).
70. *E.g.*, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).
71. 28 U.S.C. § 1292(b) (1970).
72. 337 U.S. 541, 546-47 (1949).
73. Ahrensfeld v. Stephens, 528 F.2d 193 (7th Cir. 1975).
74. See a discussion of the difference between 'abstention' (retain jurisdiction) and 'equitable restraint' (dismissal) in Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, (1976) DUKE L.J. 523.

stances appropriate for abstention",[75] a district court may dismiss the action before it, without prejudice. This seems to be the same thing as "abatement", in spite of the panel's earlier cited footnote.[76] This order will be immediately appealable as a final order.

The power to stay proceedings, at least where abstention or dismissal would not be appropriate, will no longer remain in the district court. This will probably be a boon to plaintiffs since the stay order would not have been appealable. The ruling ought not to affect the power of the district court to enter a stay under more routine circumstances.

Dema v. State of Illinois[77] was a fairly straight-forward application of the abstention doctrine. Plaintiffs there in effect sought to enjoin pending state criminal prosecutions. Plaintiff's addition of a new party in the federal court, which was an alter ego to other parties defendant, did not lend merit to any arguments against abstention.[78] The federal case was dismissed. The fact that the statute of limitations may run and thus bar an additional action before the state court acts is not an argument against abstention as the parties may seek review of whatever action is taken by the Illinois courts in the Supreme Court of the United States, either by appeal as a matter of right, or by writ of certiorari.[79]

Warshawsky & Co. v. Arcata National Corp.[80] represents a more traditional problem concerning the entry of a stay order where two federal courts are involved. The Seventh Circuit held that while many considerations will enter into whether the court ought to stay its or the other court's proceedings, the idea is to further efficiency, convenience, and to avoid duplicate litigation.[81] The fact that a second federal action ought to have been filed as a compulsory counterclaim to a first federal action does not resolve the issue of which proceeding ought to be stayed, though the order of filing is entitled to weight. The ultimate goal is to expedite the completion of the litigation.

SERVICE OF PROCESS

Tremps v. Ascot Oils Inc.[82] was the only case decided which dealt with the problem of service of process. In *Tremps*, a complaint named as defendant "James R. Cunningham, Jr." and identified him as President of

75. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).
76. See text accompanying note 61 *supra*.
77. 546 F.2d 224 (7th Cir. 1976).
78. *Id.* at 226.
79. *Id.*
80. 552 F.2d 1257 (7th Cir. 1977).
81. *Id.* at 1261.
82. 561 F.2d 41 (7th Cir. 1977).

Ascot Oils, Inc. The summons served with the complaint identified the defendant merely as "James R. Cunningham". Service of process was made on the secretary of James R. Cunningham, Jr. and James R. Cunningham, Sr. James R. Cunningham, Sr. was the party who should have been named and served. There was no question that James R. Cunningham, Sr. had actual notice of the lawsuit.[83] The court held that a defendant who is clearly identified by summons and complaint and who has received actual service may not avoid jurisdiction because of an incorrect name.[84] The court seemed to favor the "objective" test; whether it is reasonable to conclude that the plaintiff had that defendant in mind or whether plaintiff actually meant to serve and sue a different person.[85] The court suggested that other more liberal standards might exist, as when there was a reasonable doubt or confusion about who the plaintiff intended to sue, or when the defendant would be required to answer a clearly ambiguous complaint. The court did not need to choose a standard, however, because under the most liberal test, Cunningham had been validly served.

PLEADING, AMENDMENTS

In *Barnes v. Callaghan & Co.*,[86] the plaintiff had filed an employment discrimination suit in 1973. At the time of trial (1975), the plaintiff amended her complaint to add a pendent claim for relief in slander.[87] The district court found that the slander count was not barred by the one year Illinois statute of limitations[88] because "the gravamen of the original complaint was clearly the injury to plaintiff's reputation and employment opportunity occasioned by the alleged malicious conduct of the defendant."[89] A bench trial of the civil rights claim was had and decided against the plaintiff, and a jury trial of the slander case was decided in her favor. The Seventh Circuit affirmed the civil rights act finding and reversed the slander judgment on the ground that the claim was barred by the Illinois statute of limitations.[90] The court disagreed with the district court that the gravamen of the original complaint was injury to the plaintiff's reputation. It found that Illinois, in an action for slander, requires allegations of malice and publication.[91] The original and amended complaints, prior to the fourth amended complaint, did not contain those allegations.

83. *Id.* at 43-44.
84. *Id.* at 44.
85. *Id.*
86. 559 F.2d 1102 (7th Cir. 1977).
87. *Id.* at 1104.
88. ILL. REV. STAT. ch. 83, § 14 (1975).
89. 559 F.2d at 1104-05.
90. *Id.* at 1105.
91. *Id.* at 1106.

PRELIMINARY INJUNCTION

Preliminary injunctions are not easily available in the Seventh Circuit. Failure to meet any of the requirements for preliminary injunction,[92] *i.e.* adequate remedy at law, balance of interests, reasonable likelihood of success on the merits, or disservice of the public interest, may result in the denial or in affirmance of the denial of a preliminary injunction.

In *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc.*,[93] plaintiffs argued that, where there was irreparable injury shown (here, a termination of their business), and where the balance of hardships weighed clearly in their favor, a preliminary injunction should be entered without a strong showing of likelihood of success on the merits. Plaintiffs relied on the Second Circuit case of *Semmes Motors, Inc. v. Ford Motor Co.*[94] The Seventh Circuit has never dealt squarely with this argument, and it did not do so here:

> In this circuit, we have cited *Semmes*, but not as eliminating the need to show some likelihood of success. . . . [B]ut since in our view [plaintiffs] have failed to show the lack of an adequate remedy at law, it is not necessary for our decision to consider the questions of likelihood of success in detail.[95]

The court seems to fall back on a line of recent cases,[96] both published and unpublished, holding that lack of an adequate remedy at law consists not in being able to prevent a drastic harm—such as termination of an on-going business—but lack of ability to carry on the actual court proceeding for redress of the grievance. The court stated: "Because the loss of their respective stores and in most cases sole livelihood, would have crippled if not destroyed their ability to carry out their antitrust case, be granted relief to the franchisees. The remedy at law would have become non-existent if they lacked the ability to prosecute it."[97] This is a very narrow interpretation of what constitutes an adequate remedy at law.

SUMMARY JUDGMENT

Three cases dealt with the propriety of granting summary judgment.[98] In *Peoples Outfitting Co. v. General Electric Credit Corp.*,[99] the court held

92. *See, e.g.*, Washington v. Walker, 529 F.2d 1062 (7th Cir. 1976); Nuclear-Chicago Corp. v. Nuclear Data, Inc., 465 F.2d 428 (7th Cir. 1972).
93. 545 F.2d 1096 (7th Cir. 1976).
94. 429 F.2d 1197 (2d Cir. 1970).
95. 545 F.2d at 1098.
96. *See, e.g.*, Milsen Co. v. Southland Corp., 454 F.2d 363 (7th Cir. 1971).
97. 545 F.2d at 1098.
98. Choudry v. Jenkins, 559 F.2d 1085 (7th Cir. 1977); People's Outfitting Co. v. General Electric Credit Corp., 549 F.2d 42 (7th Cir. 1977); Askew v. Bloemaker, 548 F.2d 673 (7th Cir. 1976).
99. 549 F.2d 42 (7th Cir. 1977).

summary judgment to be inappropriate in a contract case where one of the issues involved the defendant's intent to obligate itself. "Issues of intent are particularly inappropriate for disposition under Rule 56."[100] In addition, noting that summary judgment is to be granted with caution, the court found a factual dispute with regard to whether the parties intended to be bound by an oral agreement based upon several documents, in spite of the deposition testimony of an officer of the plaintiff corporation that oral conversations were reduced to writing and there were no oral agreements.[101] Again, it was a question of contractual intent making summary judgment inappropriate.

In a different context, intent barred the granting of summary judgment in a civil rights action arising out of the mistaken raid of plaintiff's home by federal drug enforcement agents. A valid defense would have been a showing that the officers believed in good faith that their conduct was lawful, and that that belief was reasonable. The officers filed affidavits to that effect. The court in *Askew v. Bloemaker*[102] held that such affidavits stated only conclusions and were entitled to "little weight on a motion for summary judgment."[103] The affidavits contained nothing to show that there was no material issue of fact as to the reasonableness of the officers' belief, and there was a wide range of evidentiary material available to the district court controverting the officers' conclusionary assertions with specific facts. "Cases in which motive and intent play a leading role are particularly inappropriate for disposition on a motion for summary judgment."[104]

In *Choudhry v. Jenkins*,[105] also a civil rights case, summary judgment was entered against the plaintiff by the court without motion of any party, and without notice to any party, and after hearing evidence and argument solely on the question of whether a temporary restraining order should issue. A rule 12(b) motion to dismiss had not even been filed. In addition, the court in hearing the temporary restraining order had specifically limited its consideration to that question alone.[106] The Seventh Circuit held that without a rule 56 motion from a party, or a rule 12(b) motion which might be treated under rule 12 as a motion for summary judgment, the district court normally lacks power to enter a summary judgment.[107] Instances suggested as an exception to this general rule are where issues are submitted to the court under such circumstances as to constitute a waiver of the notice and hearing requirements of rule 56.[108] The court cited a case where the parties

100. *Id.* at 45.
101. *Id.* at 46.
102. 548 F.2d 673 (7th Cir. 1976).
103. *Id.* at 679.
104. *Id.*
105. 559 F.2d 1085 (7th Cir. 1977).
106. *Id.* at 1088.
107. *Id.* at 1088-89.
108. *Id.* at 1089.

agreed at a pretrial conference to submit certain issues of law for decision by the court,[109] thus, in effect conceding that there were no essential facts in dispute. In that situation, the filing of a motion for summary judgment would have been a mere formality. That was not the case in *Choudhry*, and the summary judgment was reversed.

MULTIPLE PARTIES OR CLAIMS

In *Dreis & Krump Mfg. Co. v. Phoenix Ins. Co.*,[110] an interesting situation involving third party claims and an insurer's duty to defend arose. The second buyer of an allegedly defective product sued the first buyer and the manufacturer. The manufacturer tendered the defense to its insurer which denied coverage based on a contractual endorsement which provided that the insurer would "pay on behalf of the insured all sums which the insured by reason of the *liability assumed by him under any written contract* shall be legally obligated to pay. . . ."[111] Thereafter the first buyer filed a crossclaim against the manufacturer. The manufacturer failed to tender the defense of the crossclaim to its insurer. The manufacturer and the first buyer were held jointly liable to the second buyer.[112] The district court entered summary judgment against the insurer, finding that it had a duty to defend the manufacturer regarding the cross-complaint.[113] As the crossclaim was the only claim in which there may have been a written contract and, therefore, insurance coverage, the Seventh Circuit held that the failure to tender that defense defeated the manufacturer's claim against the insurer.[114] The district court's finding of summary judgment against the insurer was reversed.

CLASS ACTIONS

Two cases of significance arose regarding class actions.[115] The first may be a setback for consumer class actions. *Winokur v. Bell Federal Savings and Loan Association*,[116] was brought on behalf of a class of depositors against a class of savings and loan associations. Plaintiff alleged misrepresentations in advertising regarding the computation of interest earnings. The district court refused certification of the defendant class on the grounds that the numerosity requirements were not met and there were not questions of law and fact common to the defendant class because each

109. United States v. Fisher-Otis Co., 496 F.2d 607 (10th Cir. 1973).
110. 548 F.2d 681 (7th Cir. 1977).
111. *Id.* at 683.
112. *Id.* at 682.
113. *Id.*
114. *Id.* at 685.
115. Sussman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977); Winokur v. Bell Fed. Sav. and Loan Assoc., 560 F.2d 271 (7th Cir. 1977).
116. 560 F.2d 271 (7th Cir. 1977).

savings and loan association had different interest practices and advertisements.[117] The court also refused to certify the plaintiff class because there were too many individual questions of fact and the named plaintiffs were not typical of the class. They knew of the bank policies and did not rely on misconceptions as to interest practices.[118] The district court refused to make a finding under section 1292(b)[119] permitting an interlocutory appeal. Plaintiffs filed an appeal anyway which was dismissed. Defendants thereafter tendered to plaintiffs $12.00 each plus costs. At that point in time, all parties conceded that the interest practices were changed so that the representations made in advertising were accurate. The district court then dismissed the case as moot, from which plaintiffs filed a second appeal.[120] Plaintiffs contended that if the merits were decided in their favor, they would be entitled to attorneys' fees from any fund recovered for the benefit of the plaintiff class.

The court discussed a number of Supreme Court decisions,[121] and drew the following generalizations with regard to appealability of class certification questions.[122] First, if a class has been certified and the named party thereafter loses his individual interest, adjudication on the merits is nevertheless appropriate as class members are represented by the named party and there is still a live controversy. Second, if there is no class certification and the named party loses his individual interest, further adjudication is not appropriate because there is no controversy. Third, where class certification is denied and the trial court determines the claim on the merits, the named party may seek review of the denial. Fourth, where class certification is denied and the named party elects not to seek review, a member of the proposed class may promptly intervene and seek such review. The court recognized the case as fitting within the second generalization[123] and found no controversy.

The court stated that while the change in defendants' practices resulted in greater allowances of interest than some depositors may have had under old practices, "plaintiffs' lawsuit could equally have resulted in defendants' continuing the practices but inserting additional statements in the advertisements to obviate plaintiffs' objections to them."[124] The court concluded that

117. 58 F.R.D. 178, 180 (N.D. Ill. 1972). *See also* FED. R. CIV. P. 23.

118. *Id.* at 181-82.

119. 28 U.S.C. 1292(b) (1970) (permits appeals of otherwise non-appealable orders where the district court is of the opinion that the order involves a controlling issue of law).

120. 560 F.2d at 274.

121. United Air Lines, Inc. v. McDonald, 97 S. Ct. 2464 (1977); East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977); Kremers v. Bartley, 431 U.S. 119 (1977); Franks v. Bowman Trans. Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); Weinstein v. Bradford, 423 U.S. 147 (1975); Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128 (1975).

122. 560 F.2d at 277.

123. *Id.*

124. *Id.* at 274-75.

there would "clearly be no occasion for an allowance of attorneys' fees even if plaintiffs achieved a favorable decision on the merits."[125] The question of attorneys' fees alone did not provide plaintiffs with a stake in the controversy on the merits.

Though the relief suggested by the Seventh Circuit is a possibility, it would seem equally possible that, assuming misrepresentations were proven, depositors would be awarded the greater allowances of interest to which they would have been entitled had defendants' practices comported with their advertisements instead of an injunction banning such advertising. Thus, the court's opinion seems more interested in disposing of the case short of the merits than total accuracy in the reasoning by which the court arrives there. Alternatively and conceivably, the court might have reached the class action question, determined that the district court was correct in denying class certification, and proceeded to find that the case was indeed moot on appeal. The court refused to do that.

A petition for rehearing was filed and denied.[126] Judge Luther N. Swygert was alone in voting for a rehearing en banc and filed a statement to that effect.[127] Judge Swygert found himself unable to subscribe to a rule which insulated from appellate review "a decision denying class certification solely because a defendant tendered a few dollars to a putative class representative."[128] He suggested unfortunate consequences for future consumer class actions in that defendants may now have the "arbitrary power to bar appellate review by simply tendering the damages claimed by the putative class representative."[129]

The only counterweight to Judge Swygert's concern is rule 23(e).[130] Once a class action is filed, regardless of whether there has been certification of the class, there is some authority that it may not be dismissed or compromised without court approval.[131] The very fact of district court review may prevent some of what could be the worst consequences of the *Winokur* decision. If the Seventh Circuit is going to reach the *Winokur* result, it should at least make clear that forced review at the district court level of settlements is required even without class certification. Otherwise unfortunate or even collusive settlements will be encouraged.

In a second class action case, the Seventh Circuit dealt with a problem which is of growing concern: adequacy of representation and conflict of

125. *Id.*
126. 562 F.2d 1034 (7th Cir. 1977).
127. *Id.*
128. *Id.*
129. *Id.*
130. FED. R. CIV. P. 23(e).
131. *See* Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); 7A C. WRIGHT & A. MILLER, FED. PRAC. & PROC. § 1797, pp. 236-7 (1969).

interest between the plaintiff class and its attorneys. In *Sussman v. Lincoln American Corp.*,[132] the court found that the plaintiffs would not fairly and adequately represent the interests of the class when one plaintiff was an attorney practicing with the attorney of record in the class action; a second plaintiff was the mother of the first attorney/plaintiff; and the second attorney of record for the plaintiffs rented and shared office space in the same suite of offices as the plaintiff/attorneys' law firm. In addition, the potential recovery for the individual plaintiffs was significantly less than the attorneys' fees which might have been generated from the suit. The interest of the plaintiffs in the law firm presents a possible conflict of interest. This would not be altered even if the plaintiff/attorney waived the fees; it is not clear that such fees can be waived and there would still be the appearance of a conflict of interest.

In a consolidated case,[133] the plaintiff was the brother of one of the two attorneys representing the plaintiff. The second attorney rented and shared office space in the same suite with the first attorney. The district court held that where an individual plaintiff is represented by a member of his immediate family and/or one of his relatives' close associates, class certification is not appropriate.[134] Plaintiffs appealed, characterizing the district court's rule as a per se approach and suggested that the adequacy of class representatives be determined under the same rules as applied to fiduciaries acting on behalf of others in a non-class action context. Plaintiffs argued that there should be a showing of an actual danger of conflict of interest rather than the mere possibility of conflict.

The Seventh Circuit cited authority from other jurisdictions which apparently creates a per se rule that refuses to permit class attorneys, their relatives or business associates from acting as the class representatives.[135] The court affirmed the lower court's decision in the consolidated cases, but it did not adopt the per se analysis. It found, that "without regard" to waiver of fees, there was a likelihood of a conflict of interest.[136] The court stated:

> We find that the district judge was acting well within his discretion in strictly applying the requirements of Rule 23(a)(4) where the close relationship between plaintiff and counsel creates an inherent conflict of interest. We note, however, that judicial control over class settlements and attorney's fees might, under other circumstances, provide adequate protection for the due process rights of the absent class members.[137]

132. 561 F.2d 86 (7th Cir. 1977).
133. Flamm v. Eberstadt, 561 F.2d 86 (7th Cir. 1977).
134. 72 F.R.D. 187, 190 (N.D. Ill. 1976).
135. 561 F.2d at 93. *See, e.g.*, Kramer v. Scientific Control Corp., 534 F.2d 1085 (3rd Cir. 1976).
136. 561 F.2d at 95.
137. *Id.* at 96.

The Due Process clause requires that represented parties adequately protect the interest of absent class members. Since the requirement has a constitutional basis, it is not clear when someone closely related to a class representative might not affect the adequacy of representation. Nevertheless, the court left the possibility open.

DISCOVERY AND PRETRIAL PREPARATION

Federal Rule of Civil Procedure 26(a)(2)[138] requires a party to supplement interrogatory answers if he obtains information "upon the basis of which (A) he knows the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment."[139] Plaintiff in *Holiday Inns, Inc. v. Robertshaw Controls Co.*[140] discovered that sanctions will be applied when there is a failure to comply with the rule and supplement interrogatory answers.

Plaintiff in *Holiday Inns* sued to recover damages from a fire in a deep fat fryer manufactured and sold by the defendant. The district court held that the fire was caused because plaintiff's personnel used insufficient grease to cover the unit's heating elements.[141] The lower court refused to consider an alternative theory that the unit was unreasonably dangerous because it lacked an oil level sensing device that would shut the fryer off if the oil level fell below the heating elements. The court based its refusal to consider the theory on a response plaintiff made to an interrogatory asking whether there were any parts or components that were defective or dangerous.[142] Plaintiff had responded only with respect to a temperature control thermostat. Defendants were informed of the new theory four days before trial. Plaintiff's failure to disclose its new theory was not salvaged either by a pre-interrogatory boiler plate in the complaint, or by a post-interrogatory letter in which plaintiff stated "that the design of the appliance leaves something to be desired", but did not mention that the letter was intended to supplement the interrogatory answer.[143]

In a case that will warm the hearts of many excellent pre-federal rule trial lawyers who often had to try cases with very little discovery, the Seventh Circuit in *Identiseal Corp. v. Positive Identification Systems, Inc.*[144] held that a district court lacked the authority to compel a plaintiff to conduct discovery instead of permitting the plaintiff to litigate the entire suit

138. FED. R. CIV. P. 26(a)(2).
139. *Id.*
140. 560 F.2d 856 (7th Cir. 1977).
141. *Id.* at 857.
142. *Id.*
143. *Id.* at 857-58.
144. 560 F.2d 298 (7th Cir. 1977).

at trial.[145] In *Identiseal*, a pretrial conference was held. The district court issued an order concluding that pretrial work necessary to try the action efficiently had not been done.[146] The court ordered the action dismissed for want of prosecution, and stayed the order for approximately two months.[147] The court stated that the order would be vacated if plaintiffs' counsel during the period of the stay conducted specified discovery and submitted a new pretrial order. Plaintiffs' attorney moved to vacate the order and filed an affidavit of counsel stating that he had " 'made a considered judgment that discovery would in no way be beneficial to the plaintiff's interest and would at most be of some significant support or assistance to the defendant.' "[148] Plaintiff's counsel argued that the order exceeded the district court's power. The district court acknowledged the argument that it might not compel a litigant to conduct discovery, but did not reach the issue because it held that plaintiff had also failed to file the pretrial report called for in the earlier order.[149] The action was dismissed without prejudice.

The Seventh Circuit held that the district court's dismissal of the complaint based on failure to file a pretrial report could be upheld only if the court's earlier order compelling plaintiff to conduct discovery could be upheld, as plaintiff had previously filed a pretrial order containing all of the information which, without discovery, it had.[150] The court found no power in the Federal Rules of Civil Procedure[151] to compel discovery. It similarly found no power in federal rule 16 governing pretrial procedure. Rule 16 only requires the parties to appear and "consider the possibility of admissions of which would lessen task at trial."[152] The plaintiff did not engage in conduct which could be characterized as a failure to prosecute, for he was ready to go to trial but merely disagreed with the district court about the desirability of discovery. The Seventh Circuit specifically noted that its decision was based on more than the absence of express authority to compel discovery in rule 16. "It is also based on the traditional principle that the parties, rather than the court, should determine litigation strategy."[153]

In *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*,[154] the parties were unable to agree upon a stipulation of facts in

145. *Id.* at 302.
146. *Id.* at 299.
147. *Id.*
148. *Id.* at 300.
149. *Id.*
150. *Id.* at 301.
151. FED. R. CIV. P. 26-37. These federal rules pertain to discovery and depositions. The language throughout these rules is permissive in character, stating only what a party may do to obtain discovery.
152. FED. R. CIV. P. 16.
153. 560 F.2d at 302.
154. 542 F.2d 1318 (7th Cir. 1976).

conjunction with a required pretrial order. The district court struck all of the pleadings of the party it considered to be in default and entered judgment against that party and in favor of other parties subject to proof of the amount of damages.[155] The parties who benefited by the district court's "draconian orders" relied on rule 16 governing pretrial procedures, and a local standing order on pretrial conferences to support the district court's actions. The Seventh Circuit held that rule 16 and the local rule merely require the parties to confer for the purpose of generating stipulations, which should be encouraged. [156] Nothing in rule 16, however, empowers a court to compel the parties to stipulate facts. Nor does the failure to agree, assuming the parties have conferred, constitute a failure to prosecute as to warrant dismissal or any other sanction.[157] The court noted:

> Even if Rule 16, as enforced through Rule 41(b) or the court's inherent ability to control its own docket, had empowered the court to compel parties to stipulate, [the district court] would have been constrained to fix an 'appropriate measure of discipline' on any recalcitrant counsel. [Citation omitted.] The ultimate sanction of dismissal should be utilized only in the face of conduct so reprehensible that no other alternative sanction would protect the integrity of the pre-trial procedures contemplated by Rule 16.[158]

The court further found that none of the sanctions of rule 37[159] were available for failure to stipulate facts, and could find no other source of power for such an order.[160] Nevertheless, the court added in a final footnote:

> If further discovery or other pretrial matters remain to be completed, the next trial judge should attempt to control any undue rigidity of counsel for any of the parties. Sanctions are often available to counter pre-trial recalcitrance, even though not authorized for failure to agree on a stipulation of facts.[161]

JUDGMENTS

In *Hahn v. Becker*[162] the court considered whether a motion for a judgment notwithstanding the verdict pursuant to rule 50(b)[163] must be served within 10 days after entry of judgment, or merely had to be filed within 10 days after entry of judgment. Rule 59(b)[164] and (e)[165] relating to motions for new trial or motions to alter or amend judgments specifically require that the motion shall be *served* not later than 10 days after entry of

155. *Id.* at 1321.
156. *Id.* at 1322.
157. *Id.* at 1323.
158. *Id.* at 1324.
159. FED. R. CIV. P. 37.
160. 542 F.2d at 1325.
161. *Id.* at 1326 n.14.
162. 551 F.2d 741 (7th Cir. 1977).
163. FED. R. CIV. P. 50(b).
164. *Id.* at R. 59(b).
165. *Id.* at R. 59(e).

judgment. Rule 50(b), provides that: "not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with this motion. . . ."[166] Although the court found that it was probably the intent of the drafters of rule 50(b) that the time limitation therein be the same as the time limitation for new trial or motions to alter or amend judgments, the wording was nevertheless different and did not give a party notice of the precise intent.[167] Therefore a rule 50(b) motion need only be *filed* within 10 days after entry of judgment, and must be *served* within a reasonable time thereafter.

In *Ben Sager Chemicals International, Inc. v. E. Targosz & Co.*,[168] judgment was entered against one defendant for failure to comply with discovery requests. Thereafter, the plaintiff and a second defendant entered into a settlement agreement. The agreement provided that plaintiff would assign its judgment against the first defendant to the second defendant. The second defendant agreed to collect the judgment, and the agreement contained a schedule for dividing the proceeds.[169] Based on this settlement, the remainder of the suit was dismissed. Some months later the second defendant sought to execute judgment against the first defendant, who promptly filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(1)[170] and (6)[171] for relief from judgment.

The grounds asserted by the defendant for rule 60 relief were the neglect of counsel in failing to inform its client that the case was removed from state to federal court, that requests for production of documents and other discovery had been submitted, and that the court had ordered sanctions and a default judgment against the defendant because of a failure to comply with the discovery requests. The defendant also claimed diligence in determining the status of the case because on several occasions it had inquired about the case and defendant's counsel had assured it that the case was coming along fine. In fact, defendant's counsel was disbarred at some point during the course of the events.

The district court found that the defendant's counsel's action did not constitute excusable neglect under rule 60(b)(1).[172] Even assuming relief were available under 60(b)(6) to a diligent client where an attorney's actions are grossly inexcusable, the court nevertheless denied relief on the grounds that the client was not in fact diligent and that the plaintiff and the second

166. *Id.* at R. 50(b).
167. 551 F.2d at 744.
168. 560 F.2d 805 (7th Cir. 1977).
169. *Id.* at 808.
170. FED. R. CIV. P. 60(b)(1).
171. *Id.* at R. 60(b)(6).
172. 560 F.2d at 809.

defendant had relied on the default judgment in entering into a settlement agreement. Moreover, the district court noted that the defendant had available the remedy of suit for malpractice.[173]

The Seventh Circuit upheld the district court in its denial of relief under rule 60(b)(1) in the absence of any showing which would have justified the neglect of counsel.[174] The court then discussed a split in authority under rule 60(b)(6) under which some courts hold that gross negligence of counsel will support relief,[175] while others hold that the gross neglect of a freely chosen counsel is the neglect of the client, and is, therefore, cognizable only under rule 60(b)(1).[176] The Seventh Circuit declined, however, to adopt either rule, finding only that there was "neither evidence as to why [counsel] neglected to comply with discovery nor [a] showing that defendant diligently watched over the lawsuit."[177]

In *United States ex rel. Hi-Way Electric Co. v. Home Indemnity Co.*,[178] the Seventh Circuit held that the district court erred in refusing to stay enforcement of a registered foreign judgment. The foreign judgment creditor had initially sought enforcement of the judgment in the state courts of Illinois and only when confronted with a possibility of a set-off did it seek to register the judgment in the federal court.[179] The state court had earlier stayed enforcement proceedings while the set-off was being determined.

The Seventh Circuit held that the district court had the power to stay the enforcement of a registered judgment under rule 62(f)[180] and the same discretion to do so as it had on a motion seeking to stay an original proceeding in the district court.[181] The court held that a stay should have been granted because of the judgment creditor's conduct in the state court.

LAW OF PRIOR ADJUDICATION

In *Butler v. Stover Brothers Trucking Co.*[182] plaintiff sought to recover for personal injuries suffered in a collision involving three tractor-trailers. Plaintiff was in one truck, a driver named Paulson was in a second truck owned by Stover Bros., and a man named Gutkowski was in a third truck owned by Container Corporation of America. Gutkowski was killed in the accident. His widow brought suit in the Circuit Court of Cook County

173. *Id.*
174. *Id.*
175. *Id.* at 809-10.
176. *Id.* at 810. *See* Link v. Wabash R.R., 370 U.S. 626 (1962); United States v. Cirami, 535 F.2d 736 (2d Cir. 1976); Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967).
177. 560 F.2d at 811.
178. 549 F.2d 10 (7th Cir. 1977).
179. *Id.* at 11.
180. FED. R. CIV. P. 62(f).
181. 549 F.2d at 11.
182. 546 F.2d 544 (7th Cir. 1977).

against Stover Brothers and Paulson.[183] There was a jury verdict against defendants in the state court suit.

Plaintiff in *Butler* filed a motion for summary judgment in the district court on the question of defendants' negligence, asserting that the defendants were collaterally estopped from contesting negligence in the district court since they had enjoyed a full opportunity to litigate the question of negligence in the prior state suit.[184] The district court granted plaintiff's motion for summary judgment. The Seventh Circuit reversed. Although not resurrecting the mutuality requirement for the application of collateral estoppel, the court believed it necessary that the party against whom the estoppel is to be applied have a full and fair opportunity to litigate the issue in the prior proceeding, "and that application of the doctrine will not result in an injustice under the particular circumstances of the case."[185] Under the circumstances it would be unfair to allow plaintiff to benefit by the application of collateral estoppel when one of the defendants had been prevented from testifying in the prior state court suit because of invocation of the Illinois Dead Man Act.[186] If the plaintiff in the federal case had participated in the state trial, the defendant's testimony would have been admissible against this plaintiff. Therefore, it would be inequitable to place him in a better position in the federal court than that which he would have enjoyed in the state action, solely because of the identity of parties.

In *Grossgold v. Supreme Court of Illinois*,[187] the plaintiff was suspended from the practice of law. He was later pardoned by President Ford and moved for reconsideration of his suspension in the Illinois Supreme Court.[188] The petition was denied, and plaintiff filed a petition for a writ of certiorari in the Supreme Court of the United States which also was denied.[189] Plaintiff then filed a federal complaint asking the district court to issue a writ of mandamus to the Supreme Court of Illinois to reinstate him, and to issue a declaratory judgment that his suspension was null and void. The district court dismissed the action for lack of jurisdiction and the Seventh Circuit affirmed on the ground that the doctrine of res judicata bars any further litigation of the question, as the same question had been considered judicially by the Illinois state courts.[190]

REVIEW ON APPEAL

Predictably, there were a number of cases decided by the Seventh

183. *Id.* at 545-46.
184. *Id.* at 548.
185. *Id.* at 551.
186. ILL. REV. STAT. ch. 51, § 2 (1975).
187. 557 F.2d 122 (7th Cir. 1977).
188. *Id.* at 123.
189. In re Grossgold, 421 U.S. 964 (1975).
190. 557 F.2d at 124-25.

Circuit dealing with the appealability of various kinds of orders, the scope of review on appeal and the timeliness of appeals. Following is a summary of those decisions.

With regard to appealable orders, in *Winokur v. Bell Federal Savings & Loan Association*[191] the court held that an order denying certification of a class was not appealable when the case thereafter becomes moot as to the named parties. In *C. Itoh & Co. (America) Inc. v. Jordan International Company*,[192] the court held an order denying a stay pending arbitration appealable under the rule of *Baltimore Contractors v. Bodinger*,[193] which allows appeals when the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law, and the stay was sought to permit the prior determination of some equitable claim or defense. In *Pabst Brewing Co. v. Brewery Workers Local Union 77*,[194] the court held a contempt order appealable under section 1291[195] as a final order where it found that the contempt was criminal rather than civil. Appellate review was limited, however, to errors in the contempt proceeding and not to the validity of the underlying order. In *United States ex rel. Hi-Way Electric Co. v. Home Indemnity Co.*[196] the court held appealable as a final order under section 1291[197] a district court's order denying a motion for stay of enforcement of a registered foreign judgment. In *Schloetter v. Railoc of Indiana, Inc.*[198] the court permitted an appeal from a district court order compelling the defendant's attorney to withdraw because of the appearance of a conflict of interest. Such an order is appealable under the collateral order doctrine of *Cohen v. Beneficial Loan Corp.*[199] Finally, in *Velsico Chemical Corporation v. Parsons*,[200] the court permitted appeal of a motion to compel testimony and production of documents from a corporation's officers and attorneys, by the corporation, which had been granted leave to intervene under authority of *Perlman v. United States*.[201] The corporation would have no way to protect its rights in the absence of such an appeal, which becomes a final order under section 1291.

In *Stern v. United States Gypsum, Inc.*[202] the court dealt with the scope of review on appeal. An interlocutory appeal was taken in *Stern* pursuant to

191. 560 F.2d 271 (7th Cir. 1977).
192. 552 F.2d 1228 (7th Cir. 1977).
193. 348 U.S. 249 (1955).
194. 555 F.2d 146 (7th Cir. 1977).
195. 28 U.S.C. § 1291 (1970).
196. 549 F.2d 10 (7th Cir. 1977).
197. 28 U.S.C. § 1291 (1970).
198. 546 F.2d 706 (7th Cir. 1976).
199. 337 U.S. 541 (1949).
200. 561 F.2d 671 (7th Cir. 1977).
201. 247 U.S. 7 (1917).
202. 547 F.2d 1329 (7th Cir. 1977).

section 1292(b).[203] The court would not permit appellees to present on appeal a theory which was not made a part of the controlling question of law certified by the district court and was not included in the grounds for the petition for leave to appeal filed thereafter.

In *Butler v. Stover Brothers Trucking Co.*[204] the question of the timeliness of an appeal was raised. On December 12, 1975, a jury found for the plaintiff, and on the same day the clerk prepared and signed a judgment pursuant to Federal Rule of Civil Procedure 58.[205] Post-trial motions were filed and on February 3, 1976, denied by the court. Additional motions were heard by the court on March 25, 1976. Neither the court nor counsel was aware at that time that the clerk had, on December 12, 1975, entered a judgment on behalf of plaintiff.[206] The court, on March 25, 1976, ordered entry of judgment. Defendants filed a notice of appeal on April 20, 1976. Plaintiff argued that the appeal should be dismissed on the ground that it was not timely filed. The Appellate Court found the review timely. The clerk's duty to enter judgment under rule 58[207] was ministerial only. The trial judge had indicated after the return of the verdict that judgment would not be entered until after ruling on defendants' post-trial motions.[208] Although this did not constitute a direct order to the clerk not to enter judgment, the clerk should have been put on notice. Therefore, the clerk acted beyond the scope of his authority under rule 58, the December 12th judgment was void, and the notice of appeal was timely filed from the judgment entered on March 25, 1976.[209]

BILL OF COSTS

In *Denofre v. Transportation Ins. Rating Bureau*[210] judgment was entered on May 20, 1977. A bill of costs was not filed until June 21, 1977. The court held that while the clerk of the court of appeals had the power "at any time" to add a bill of costs to a mandate after its issuance, nevertheless, a bill of costs will not be allowed if not filed within the fourteen day time limit of Federal Rule of Appellate Procedure 39(c)[211] absent a showing of good cause for the delay.[212] Mere inattendance to the daily chores of a law office is not a good cause.[213]

203. 28 U.S.C. § 1292(b) (1970).
204. 546 F.2d 544 (7th Cir. 1977).
205. FED. R. CIV. P. 58.
206. 546 F.2d at 547.
207. FED. R. CIV. P. 58.
208. 546 F.2d at 546.
209. *Id.* at 548.
210. 560 F.2d 859 (7th Cir. 1977).
211. FED. R. APP. P. 39(c).
212. 560 F.2d at 860-61.
213. *Id. See also* Bonds v. Callahan & Co., 559 F.2d 1102 (7th Cir. 1977) with regard to

In *Stern v. United States Gypsum, Inc.*[214] the court extended its holding in *Denofre* to make clear that the time for filing a bill of costs on appeal is not extended by a motion for a rehearing, but the bill is due within 14 days of the entry of judgment.

RESPONSIBILITIES OF COUNSEL, PARTIES AND COURTS

It is difficult to read through all of a term's cases on civil procedure and not be struck by the number of instances in which counsel, courts, or parties either lacked something in diligence or precision or failed to live up to their responsibilities in some respect. It is appropriate to conclude this article with a catalog of the major faults of this kind which the Seventh Circuit dealt with this past term.

Counsel

First, traveling around or inattendance to affairs of a normal law office is not an excuse for failure to file a timely bill of costs.[215] Second, filing a conclusory post-trial motion pursuant to Federal Rule of Civil Procedure 59(e)[216] does not toll the 30 day period of Federal Rule of Appellate Procedure 4(a)[217] for filing an appeal. The motion pursuant to the rule must state with particularity the grounds therefor. The failure of the motion to do so may not be rectified by setting forth the grounds in detail in a brief. The rule "is based on important substantive policies, the finality of judgments and its application is required here by prior rulings of this court."[218] Third, failure to supplement discovery where required[219] may result in being barred from offering proof of the additional material at trial.[220] Fourth, failure of counsel in a case involving multiple parties and claims to tender the defense of each possible claim to the client's insurer may result in waiver of any rights to have the insurer later defend those claims.[221] Fifth, where conclusory pleading is utilized, the court "will not strain to find inferences favorable to the plaintiffs which are not apparent on the face."[222] Moreover, it is the duty of counsel when a complaint is dismissed to request leave to amend. If leave to amend is never sought, the trial court will not be in error if it dismisses the action with prejudice.

filing a bill of costs at the district court level within the 10 day time limit provided in a local rule without a showing of excusable neglect within Rule 6(b)(2) of the Federal Rules of Civil Procedure.

214. 560 F.2d 865 (7th Cir. 1977).
215. Denofore v. Transportation Ins. Rating Bureau, 560 F.2d 859 (7th Cir. 1977).
216. FED. R. CIV. P. 59(e).
217. FED. R. APP. P. 4(a).
218. Martinez v. Trainor, 556 F.2d 818 (7th Cir. 1977).
219. *See* FED. R. CIV. P. 26(e)(2).
220. Holiday Inns, Inc. v. Robertshaw Controls Co., 560 F.2d 856 (7th Cir. 1977).
221. Dreis & Krump Mfg. Co. v. Phoenix Ins. Co., 548 F.2d 681 (7th Cir. 1977).
222. Coates v. Illinois State Board of Educ., 559 F.2d 445 (7th Cir. 1977).

Parties

First, a party is under an affirmative duty to diligently follow the progress of litigation in which he is involved. If his counsel is negligent, or even grossly negligent, and this results in a default judgment, the party may not be able to have the default set aside. His only remedy may be that of a suit for malpractice—a remedy which may not always be effective.[223] Second, if a party has actual knowledge of a suit against him, even if he is incorrectly identified in the summons and the complaint, he is nevertheless within the jurisdiction of the court, and ignores the suit at his peril.[224]

Courts

First, district courts in diversity cases should include in their opinions their determination of what law was applied.[225] Second, trial courts may not compel a party to conduct discovery in order to comply with that court's pretrial order procedure.[226] Third, a court may not award summary judgment, nor should it really take other important procedural steps, without a warning to the parties and an opportunity to make a proper record.[227] Otherwise the appellate court will be confronted with

> one of those troublesome cases in which an appeal follows a disposition occurring by way of procedures amounting to something less than a full trial and which . . . presents serious procedural questions in a record situation wherein further attention at the trial court level with rectification of any procedural errors conceivably could be followed by the same result as before in the litigation.[228]

Fourth, a court should state reasons for its rulings. For example, if it denies leave to intervene it should state why, thus making review of the court's exercise of discretion easier for the appellate courts.[229] Fifth, a district court must not go outside of the record, relying on subjective impressions rather than objective record facts. Stay of a concurrent federal proceeding, and the subsequent vacation thereof on the basis of such "impressions" results in delay rather than expeditious handling of litigation.[230] Sixth, a court may not compel a party to enter into a stipulation of facts, as part of the pretrial order procedure, though the parties must confer in an attempt to do so.[231]

223. Ben Sager Chem. Int'l, Inc. v. E. Targosz & Co., 560 F.2d 805 (7th Cir. 1977).
224. Tremps v. Ascot Oils, Inc., 561 F.2d 41 (7th Cir. 1977).
225. Dreis & Krump Mfg. Co. v. Phoenix Ins. Co., 548 F.2d 681 (7th Cir. 1977).
226. Identiseal Corp. v. Positive Identification Sys., Inc., 560 F.2d 298 (7th Cir. 1977).
227. Choudry v. Jenkins, 559 F.2d 1085 (7th Cir. 1977) (court entered summary judgment without motions by the parties or notice by the court).
228. Macklin v. Butler, 553 F.2d 525, 527-28 (7th Cir. 1977).
229. Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977).
230. Warshawsky & Co. v. Arcata Nat. Corp., 552 F.2d 1257 (7th Cir. 1977).
231. J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976).